Institutional Retirement and Trust

Your role as a fiduciary

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Plan sponsors are becoming increasingly aware of a broad array of risks associated with their retirement plans. In actuality, there are no new risks — the same risks exist today as in the past. The difference is that the landscape has changed and corporate governance now extends to retirement plans. Retirement plans are directly impacted due to the significant dollars invested in the plans and the increased reliance on defined contribution plans as a source of retirement income.

We are committed to helping you deliver exceptional service. We offer your employees award-winning educational materials and help you achieve your plan goals with strategies to navigate the complex world of defined contribution plans. We help you manage your fiduciary responsibilities by providing you with smart strategies to help you minimize certain areas of potential risk. No doubt, ERISA is complicated. Understanding and managing your fiduciary responsibilities is one way you can help your organization protect itself. Use this tool as a reference to help guide you through your fiduciary responsibilities.

Who is a fiduciary?

The Employee Retirement Income Security Act (ERISA) was enacted to ensure that employees receive the pension and other benefits promised by their employers. ERISA defines a fiduciary (one who has a duty to act primarily for another) by function, not by title or position. A fiduciary is anyone who performs one of three functions with respect to a plan: 1) has discretionary authority with respect to the administration of the plan, 2) provides investment advice to the plan for a fee or other compensation, 3) has control or authority over the management or disposition of plan assets, or discretionary control or authority over plan management.[1]

1. Under ERISA, a plan fiduciary includes anyone who has discretionary authority with respect to the administration of the plan.

To have a meaningful discussion on discretionary authority of plan administration, it's important to distinguish between the functions of a plan sponsor, plan administrator, and plan investment committee.

- Plan sponsor — typically the employer who creates the basic terms and

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conditions of the plan, executes a document containing those terms and conditions, and provides a procedure for making amendments to the plan.

- Plan administrator — manages the plan by following its written terms, makes discretionary decisions regarding the administration of the plan and provides participants with the summary documents that describe the plan and any modifications in an understandable form.
- Plan investment committee — committee appointed by the employer to make investment decisions regarding the plan, including participant directed investment options.

While often the plan sponsor and plan administrator are the same, it is not always the case. If the plan sponsor and plan administrator roles are separate their fiduciary roles will vary.

When the employer decides to sponsor a plan, and determines what features will be included in the plan, it functions as a "settlor." A settlor is the person who sets up the trust and determines its purpose and features. Settlors are not necessarily the trustee or beneficiaries of the trust. In fact, they might not have anything to do with the trust once it's set up.

Settlor decisions vs. fiduciary decisions

Settlors have wide discretion in the design and implementation of a plan and, consistent with any applicable law (including ERISA and the Internal Revenue Code), may include provisions and features as they, in their sole discretion, deem appropriate. These decisions, made as settlor of the trust or plan, are not fiduciary functions, and the plan sponsor need not be concerned with the obligations of fiduciaries in making these decisions. However, once established, matters relating to the administration of the plan and trust, consistent with that design, may involve fiduciary decisions. The exercise of making discretionary decisions is what makes a person a fiduciary.

After the plan has been established, there may be times when an employer needs to step back into the role of plan sponsor and start making settlor decisions again as a non-fiduciary. This is frequently the case when the employer as plan sponsor amends the plan to change its features, or even the benefit structure itself. Design-based changes to a plan are settlor functions and not fiduciary functions. More specifically, settlor functions include decisions that impact who becomes a participant and when (eligibility, hours worked, eligible class of employees versus ineligible).

After the plan amendment is effective, the employer may return to the role of plan administrator acting in a fiduciary capacity. For example, if an employee falls within either of two classes of employees, one of which would make the employee eligible to participate in the plan and the other would not, the decision as to which class the employee belongs is a fiduciary decision. Therefore, care needs to be taken to ensure that an appropriate process is followed, considering all of the relevant facts and circumstances (including prior decisions for consistency) in making that decision. Designing a plan that excludes one class of employees is a settlor function, and one that the plan sponsor may make unencumbered by any fiduciary obligation.

The plan investment committee is always a fiduciary since it exercises discretion over the plan's investments.

Fiduciary fast facts

Under ERISA, a plan fiduciary:

- Has discretionary authority with respect to the administration of the plan
- Provides investment advice to the plan for a fee or other compensation
- Has discretionary control over plan management or control over the disposition of plan assets

Who is considered a fiduciary?

- Investment or retirement plan committee member
- Investment manager who manages plan assets
- Plan sponsor who chooses an investment advisor
- The chosen investment advisor
- Anyone who makes decisions about the administration of the plan, including the plan administrator

Who is not considered a fiduciary?

- Mutual fund manager
- Recordkeeper
- Plan sponsor making settlor decisions

2. Under ERISA, a plan fiduciary includes anyone who provides investment advice to the plan for a fee or other compensation.

This is perhaps the easiest fiduciary function to identify. Under ERISA, you are a fiduciary if, on a regular basis or as part of regularly provided services, you provide investment advice to either the plan investment committee or to any of the plan participants, with the expectation that the advice will be followed, and you receive compensation, either directly or indirectly, for that provision of advice. Someone who simply relays to the plan sponsor or a participant the next hot investment play would likely not be a fiduciary. In such a case, the advice (or "tip") is not provided on a regular basis or as part of a package of services and probably isn't intended to be relied on, regardless of the advice giver's confidence. A consultant retained by the plan investment committee to select plan investments is a fiduciary. However, a consultant who evaluates and monitors plan investments or who otherwise advises the plan investment committee in the investment selection process may or may not be a fiduciary. Whether such a person is a fiduciary will depend on whether the services provided to the plan investment committee include the elements outlined above. Finally, a broker who receives compensation (either directly from the plan sponsor or the plan, or indirectly from the investment managers or funds) for standard brokerage services is not a fiduciary. But, if the broker has discretion over the plan or a participant investment account or provides investment advice and is compensated in any manner by the plan, plan participant, or the plan sponsor, the broker is a fiduciary.

Investment advisor

Many people believe by hiring an investment advisor to select or monitor investment funds, the plan sponsor and its employees are relieved of the liability of being a fiduciary.

Investment managers are typically fiduciaries

Under ERISA, investment managers who directly manage a plan's assets are always fiduciaries of the plan. Investment managers who manage mutual funds (a "Registered Investment Company" under the Investment Company Act of 1940) are not considered fiduciaries with respect to the plan, as they don't manage the assets of the plan; rather, they manage the assets of the mutual fund. The plan's assets aren't the stocks or bonds managed by the mutual fund investment manager, but rather the units or shares of the mutual fund that are purchased with plan assets. Any investment manager who manages a separate account or group or collective trust into which plan assets are invested is deemed a fiduciary of the plan, as each plan that invests in a separate account or group or collective trust actually "owns" an interest in the underlying investments.

Plan sponsors who hire investment managers are still fiduciaries

Many people believe that by hiring an investment advisor to select or monitor the investment funds, the plan sponsor and its employees are relieved of the responsibility of being a fiduciary. The Department of Labor's (DOL) position, however, is that a plan sponsor is exercising discretion in the administration of a plan by choosing an investment manager, and as such is a fiduciary. Consequently, this requires the plan investment committee's initial decision to be made prudently. As a fiduciary, the plan investment committee must monitor the activities of the investment manager to ensure the decisions are consistent with fiduciary obligations. In some cases, the duties of prudent selection and active monitoring may increase a plan investment committee's fiduciary exposure.

Plan administration

The DOL's position is that a plan investment committee is exercising discretion in the administration of a plan by choosing an investment manager, and as such is a fiduciary.

One exception — only for a Registered Investment Advisor

ERISA provides an exception to the "co-fiduciary" liability when a plan sponsor engages the services of an investment professional. If the investment manager is registered as an investment advisor under the Investment Advisors Act of 1940 (or is exempt from registration in that Act) and acknowledges in writing that by being an investment manager of plan assets he or she is a fiduciary under ERISA,[2] then the plan's trustee has no liability for the acts or omissions of the investment manager unless it knowingly participates in or conceals the breach.[3] ERISA does not, however, exempt the plan investment committee from prudently selecting an investment manager or monitoring the activities of the investment manager for the purposes of determining if the manager remains a prudent choice.

3. Under ERISA, a plan fiduciary includes anyone who has control or authority over the management or disposition of plan assets, or discretionary control or authority over plan management

This two-part definition includes those who control the management of the plan and those who control the disposition of plan assets. Many operational decisions made by representatives of a plan administrator are discretionary in nature. This means that a decision is made by weighing the variables that affect the decision and taking into consideration the alternatives and how these may affect the plan, a participant, or the benefits that a participant will receive. It is in determining what variables are essential to making the operational decision, and what weight to give to each, that a plan administrator exercises fiduciary discretion. For example, if a participant requests a hardship distribution from a plan using the safe harbor definition of an eligible hardship with established, preset criteria, the plan administrator's representative exercises no discretion in the grant of that distribution request when adhering to the safe harbor guidelines. On the other hand, a hardship distribution request in a plan using a more general, facts and circumstances criteria for hardship distributions will likely require that the administrator's representative exercise discretion in the granting of the request and, therefore act as a fiduciary.

The second part of the definition names as a fiduciary anyone who has control over the management or disposition of the plan's assets. It is crucial to understand that to be considered a fiduciary under this definition, no exercise of discretion is involved. All that is required is that one manage or have control of plan asset disposition. To "have control" implies more than just a clerk processing a contribution to the plan. However, an employer's scheduling of that contribution would be a sufficient measure to make the employer a fiduciary.

The ultimate fiduciary

This is not to say that only those individuals with direct authority over plan management, plan administration, or investment advice functions are defined as fiduciaries. The DOL's interpretation is broader and more encompassing. According to the DOL, the one who can hire and fire the others bears the highest responsibility, and that can go all the way up the corporate chain of command. In other words, the Board of Directors, although not actively involved in making discretionary decisions affecting plan administration, may hire the individuals who participate on the retirement committee. So, theoretically, the Board of Directors hired the committee members, who in turn hired the plan auditor, the recordkeeper, and the trustee. Essentially, the Board of Directors is the ultimate fiduciary. The real question is, "Are they aware of it?"

Have I identified all my fiduciaries?

The question to ask yourself is, "Have I identified all the fiduciaries in my organization?" If not, you should. Once you identify the fiduciaries within your firm, make certain the individuals understand the fiduciary obligations of the plan and the serious repercussions of breaching the role. Perhaps a discussion about who are the fiduciaries and what are their responsibilities should be on the agenda at your next retirement plan committee meeting.

Can I outsource my fiduciary role?

Many employers would like nothing better than to hire their way to safety — by engaging the services of another who, as a fiduciary, would assume responsibility for management of the plan or its assets and relieve the sponsor of any responsibility or liability for the actions of the service provider. ERISA allows you to delegate certain responsibilities, and possibly limit your fiduciary responsibility, but only under very narrow circumstances. Under ERISA, if a plan document specifically names a fiduciary, or describes a specific function that is the responsibility of a fiduciary, and the duties delegated are those that are properly delegatable, the named fiduciary has exclusive responsibility for those functions.

Relief is limited

Relief from liability through the use of named fiduciaries is limited. The selection of the individuals (or entities) that will become named fiduciaries is itself a fiduciary function which must be made with the care, skill, and diligence that a "prudent expert" would utilize. While an employer may choose to hire a named fiduciary on the basis of their willingness to assume responsibility and relieve the plan sponsor of liability, liability will resume if the selection is not a "prudent choice" considering the functions the named fiduciary will assume. In addition, the employer, while not responsible for the specific activities delegated to the named fiduciary, must nonetheless monitor the named fiduciary and their activities to determine if the named fiduciary continues to be a prudent choice. That will, almost certainly, require that the employer understand what activities the named fiduciary is undertaking and the expected outcome of those activities. The employer must also be able to continuously determine that the named fiduciary is performing appropriately. Failing to do so is a breach of the plan sponsor's fiduciary duties.

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Are the duties properly delegatable?

Additionally, the employer must take care to ensure the duties the named fiduciary will assume are properly delegatable. Certain types of activities are the responsibility of specified fiduciaries and may only be delegated under very narrow circumstances, if at all. For example, the trustee always has fiduciary responsibility for safeguarding plan assets and managing them appropriately. The only exceptions to the obligation of managing the assets are when an "investment manager" (as defined in ERISA Section 3(38)) acknowledges in writing that in managing plan assets or in giving advice with respect to the management of plan assets, they are operating as a fiduciary or when the plan provides that the trustee is subject to the direction of a named fiduciary.[4]

What are my basic fiduciary responsibilities?

1. Abide by the exclusive benefit rule

The exclusive benefit rule mandates that an employee benefit plan be operated for the exclusive purpose of providing benefits to the plan's participants and their beneficiaries, while defraying the reasonable expenses of plan administration. The establishment and design of a plan is prompted by the employer's multiple concerns, one of which certainly is to provide retirement benefits to the participants and their beneficiaries. Other concerns include the need to attract and retain qualified employees, to encourage longevity and promote loyalty, and to assist in providing a comprehensive benefits package to employees in a tax-advantaged way. These latter employer concerns fall within the "settlor functions," and ERISA grants wide latitude in plan design to fulfill the employer needs as settlor. However, once the plan is established, discretionary decisions should be made while cognizant of the impact the decision will have on participant benefits. The questions, "What is in the best interests of the plan and its participants?" and "How will this impact the participants and the benefits they will receive?" should be asked whenever a significant operational decision must be made. While it is not necessary that a decision be made in such a way as to enhance the benefits to participants, by asking the questions and evaluating the impact of each decision on the participants, a fiduciary will be following a prudent process in making the decision. This generally results in the best decision.

Four fiduciary fundamentals

1. Abide by the exclusive benefit rule
2. Act prudently
3. Diversify plan assets
4. Abide by the written plan document

While it is not necessary that a decision be made in such a way as to enhance the benefits to participants, by asking the questions and evaluating the impact of each decision on the participants, a fiduciary will be following a prudent process in making the decision.

2. Act prudently

In technical terms, a fiduciary must operate with the care, skill, prudence, and diligence under the circumstance, then prevailing, that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.[5]

Translated into practical terms, ERISA asks you to operate your multi-faceted retirement plan as a "prudent expert" would. The standard is high. Not only must you function prudently, but you must do so as one who has particular expertise in the area in which you are operating. For example, if you are selecting funds for a plan, you will be held to the same standard that an investment professional would, if the professional were the one making the selections. Look at what decisions you are making and figure out what an expert in a particular field would decide. The standard isn't calling for you to be an "expert" in each field; rather, it is asking you to take the perspective of an expert.

A "prudent" expert uses a methodical approach

Being a prudent expert is sometimes misinterpreted as being a conservative expert, and that is not what Congress intended when ERISA was originally drafted. The "prudence" requirement goes hand-in-hand with being held to the standard of an "expert." To be "prudent" as an expert means you approach the situation methodically, with a plan and with a purpose that best ensures a correct outcome, produces consistent and repeatable results, and is well-documented to demonstrate the thoroughness of the examination (or process) that led to your decision. Sometimes the conclusions will not be the most conservative, but they will be the most prudent, as the decision-making process was well-reasoned and supported by documentation.

Are you using the right process?

The key to making a prudent decision is using the right decision-making process. Acting as a prudent expert would, you should:

- know what information is necessary to make the decision
- have a method for evaluating the information consistently
- have a procedure that documents how the decision was reached

The process should also include procedures for reviewing and modifying the decision when new information comes to light or if circumstances should change. Archiving minutes of how the decision was made should be part of that process. Information is dynamic and fluid, so the day after tomorrow it all may change.

If you make a decision that you later find may not have been the best decision, or if it was the right decision at that time but is no longer relevant due to subsequent events, then use the new information and original process to make the decision again. A prudent expert would do just that. Prudent experts don't always make the right decision, but they do evaluate their decisions and correct them after they obtain new information. After all, hindsight is 20/20. Don't be so concerned about making a wrong fiduciary decision that you end up not making any decision at all. Not making a decision can actually be a breach of your fiduciary duties.

Revisit your decisions periodically

Once a decision is made based on the information you've gathered, revisit your decisions periodically to ensure that each one remains prudent throughout time. Sometimes people tend to stick with a decision they've made in the past without revisiting it. For example, plans that have automatic enrollment tend to do this with the default fund selected. Conservative options are often chosen for a default fund, since this option is perceived as "safe." Ideally, the plan investment committee should review the default fund selection at least annually and document the review/discussion in the committee meeting minutes. For example, "We've reviewed our default fund election and based on our agreed criteria (list criteria), the default fund is still appropriate for those individuals who have chosen not to make a decision regarding retirement planning."

Be a "prudent expert"

Translated into practical terms, ERISA asks you to operate your multi-faceted retirement plan as a "prudent expert" would. The standard is high.

The key to making a prudent decision is using the right decision-making process. Don't be so concerned about making a wrong fiduciary decision that you end up not making any decision at all. Not making a decision can actually be a breach of your fiduciary duties.

In general, it makes sense to periodically evaluate all of your fund selections. If you select a fund using certain criteria, and later the economic situation and market have drastically changed, you should review your selection. You need to decide if you will keep the fund, add another fund along side of it, replace it, or eliminate the fund entirely. This concept applies to every fiduciary decision that you make — it was probably the right decision when you made it, but subsequent events can change the facts, and so you should assess the situation and review your decision.

In managing the assets of the plan, a "prudent expert" would define the selection criteria, monitor the investments, and replace them if necessary. It would be prudent to document these criteria and the investment selection process in an "investment policy statement."[6]

The investment policy statement

This policy should contain all of the investment selection criteria for plan assets as well as the process by which each investment will be reviewed or removed. Many investment policy statements contain "probationary periods" that will put an investment on a "watch list," should it no longer meet the criteria established for its inclusion in the plan. Typically, there is a time limit a fund can be on the watch list before action is taken. That action could be removing the investment from the plan entirely or adding an additional fund of the same or similar style to the investment lineup. If you add a similar fund, many policies limit future investments only to the newly added fund, while leaving existing investments in the troubled fund subject to participant liquidation.

Art versus science

Generally, an investment policy statement should be drafted broadly to allow the plan fiduciaries some discretion in dealing with different investment issues in an appropriate, rather than mechanical, way. Whatever the policy is, however, it would probably be a breach of fiduciary duties to not follow the process outlined in it.

There is more to properly applying an investment policy statement than simply following a series of documented steps. Interpreting the data in the context of changing market cycles and business conditions is just as important. This is the softer side, or "art," of applying an investment policy statement. A successful investment policy statement is written and used through a combination of art and science.

Measure for measure

Contained in your investment process review should be a system of checks and balances. In other words, you need a process for reviewing the process. Ask yourself, "Are these still the criteria that we should be applying to picking these funds? Has the economy/world changed so that we need to review these investments quarterly or semiannually instead of annually?" Don't be afraid to change. Changing a policy or process and documenting it means you're probably paying attention to the process itself and exercising your judgment to make decisions. How do you determine if you are using the right process? The key is to constantly reevaluate it. Ask yourself, "Is it working? Did we do the right thing? Do we need to change how we do this or change the meeting frequency, etc.?"

3. Diversify plan assets

ERISA Section 404(a)(1)(c) mandates that a fiduciary diversify the investment of plan assets to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

4. Abide by the written plan document

The final fiduciary requirement is that the fiduciaries must abide by the terms of the written plan documents, unless to do so would cause them to breach one of their other fiduciary obligations. ERISA Section 402(a)(1) requires that all plans be established and maintained pursuant to a written document. The reason for having a written document is consistent with the philosophy of empowering participants, through knowledge of the plan's provisions, to enforce those provisions either through the DOL or litigation. Consequently, abiding by the document and its terms is an essential part of complying with the ERISA precept that the plan be maintained for the exclusive purpose of providing benefits to the participants and their beneficiaries.

Will 404(c) protect me?

The fundamental fiduciary duty to manage plan assets exists both in the selection of investment funds used in a defined contribution plan and in the actual investment of participant account balances (even in plans that allow for participant direction of investments). As we reviewed earlier, the plan fiduciary will always retain some degree of liability for the selection of plan investments, even when that responsibility is properly delegated to an investment manager. However, the fiduciaries of a participant directed plan may be able to lessen their liability with respect to the actual investment of participant account balances by complying with the provisions of ERISA Section 404(c).

404(c) requirements

Complying with ERISA Section 404(c) is optional. Fiduciaries of plans that comply with its requirements are relieved of liability for losses suffered by participants as a result of their directing where their account balances will be invested. For ERISA Section 404(c) protection, a plan must be a defined contribution plan that allows for participant direction of investments, and the plan fiduciaries must offer:

- A minimum of three investment options, each of which is diversified, that when taken as a whole would allow the participants to choose a portfolio for themselves within the normal range of risk and return characteristics for participants like themselves;
- A mechanism for making investment changes with an appropriate frequency considering the nature and risks of the underlying investment funds, but at least once quarterly; and
- Appropriate information, some of which must be provided automatically to each participant,[7] and some of which must be provided on request,[8] which would allow each participant to make informed choices in structuring his or her portfolio's asset allocation.

ERISA Section 404(c)

The protections offered by ERISA Section 404(c) are transaction-based. All of the requirements must be met for each investment transaction that a participant makes.

404(c) transaction-based

The protections offered by ERISA Section 404(c) are transaction-based — that is, all of the requirements listed above must be met for each investment transaction that a participant makes. If any one of the requirements is not met with respect to an investment transaction, protection may not be afforded to the plan fiduciaries with respect to that transaction.

Now that we know who a fiduciary is and what function they should be performing, let's turn our attention toward methods designed to alleviate the inherent fiduciary risks.

What should I be doing?

Fiduciary checklist: Ten steps to minimizing your fiduciary risk

❑ *STEP 1*

Identify all the fiduciaries within your organization

A plan administrator is always a fiduciary. As a fiduciary, the plan administrator is almost always responsible for the selection and monitoring of other fiduciaries who will serve the plan. Identifying all of the individuals who function in a fiduciary capacity is the first step to understanding whether the right people are doing the right job — which will help minimize your risk exposure.

❑ *STEP 2*

Ensure that all of the fiduciary roles are being fulfilled

Not only should you know who is functioning in a fiduciary capacity, but you must make sure that all fiduciary functions are being performed. Identify each function that needs to be performed and ensure that the function is properly assigned to the individual best suited to fulfill the obligations associated with it. Then make certain each fiduciary abides by the exclusive benefit rule and the written plan documents, makes decisions like a prudent expert, and manages your retirement plan assets appropriately.

❑ *STEP 3*

Make prudent plan decisions

The "prudence" of a decision is not based on the outcome but on the process used. Gather and consider all of the relevant facts. Then, every time you have a decision to make, ask yourself, "How will this impact the plan and the participants?"

❑ *STEP 4*

Revisit your fiduciary decisions

Facts change. Circumstances change. Decisions are not made in a vacuum but are dependent on the situation in which they were made. As things change, make appropriate adjustments to your decision-making process going forward.

❑ *STEP 5*

Assess who is on your investment/retirement committee

The selection of the committee is a fiduciary decision. Ask yourself, "Is everyone on the committee qualified to assume the perspective of an expert and act accordingly? Do they have the resources available to them to make the decisions that a prudent expert would?" Many times appointees to the retirement committee are made because it is believed that being inclusive is more correct than being exclusive. That is, to obtain "buy-in" by various groups (like labor), a representative from that group is typically included on the committee. Fiduciaries do not make decisions based on opinion polls. They must operate independently and in the best interests of the plan and its participants at all times, putting aside self-interest. Being a fiduciary means being a person who can take charge, own the situation, and make tough decisions in a prudent manner.

❑ *STEP 6*

Hire the right people and monitor them

If you outsource by hiring others to perform plan functions, you must make sure they are fulfilling their roles and continuously monitor if they are still the right people to perform those functions. In fact, the more you outsource, the more monitoring and reviewing you have to do. Both internally and externally, make certain you have trusted advisors and the right people in the chain of command.

❑ *STEP 7*
Document everything

It's important to document what decisions you make with respect to the plan and the process you used to make these decisions. At formal meetings and presentations, investment reports from an investment consultant who benchmarks your fund(s) should be included as an appendix to your meeting minutes. In addition, any plan design or investment lineup conversations you have should be detailed in the minutes. For example, any criteria you used to either select a fund, put one on watch, or deselect a fund should be documented. For conversations, the expectation is not that you provide a verbatim transcript, but rather your notes should exemplify that people took their roles seriously and that information was exchanged. (John said … and Robert brought up the issue of … Margaret voiced the concern that there is a lack of understanding among participants with respect to the XYZ Fund.) Many people leave out the details fearing that too much information will provide evidence that will be used against them. In this case, the key is to illustrate that everyone was able to voice their concerns, that the deliberation was fair and complete in all respects, and that a consensus was arrived at or a decision was made in the best interest of the participants.

All of the process and policy documents a committee uses need to be periodically reviewed. It is often forgotten that documents are dynamic. For example, an investment policy statement that's five years old needs to be revisited. The economy has changed drastically in the last five years, and the criteria used for investment selection needs to be relevant to the current environment. Plan provisions may also change, which requires that any processes previously used by the committee to make decisions may need to be updated. Documenting everything, and periodically reviewing the documentation for relevance (especially with regard to processes and policies), is the hallmark of a prudent expert.

❑ *STEP 8*
Make certain your participants understand your plan

If participants understand your plan and the rationale behind making changes, they are naturally less likely to complain. A fair amount of DOL leads come from participant complaints. To avoid the DOL's intervention, it's best to communicate, communicate, communicate. A solid education and communication strategy is the best way to make sure your employees understand the plan. If you are changing plans, make sure your new provider schedules transition meetings to explain the changes and provides multiple communications to each participant to explain the process, current legislation, and the benefits of saving now. Your employees will benefit from an interactive education program that is designed to help them successfully plan for and achieve a comfortable retirement.

❑ *STEP 9*
Remember the golden rule

In other words, operate your plan in the best interests of the participants. Considering the impact on participants is the fundamental premise of being a fiduciary. If the decision may result in a perceived adverse impact on the participants (such as replacing a fund that has lost value, resulting in a "realization" of that loss by the participants), make sure the decision process is well-documented and the participants are provided with the rationale for the decision.

❑ *STEP 10*
Know thy plan

Get back to basics regarding your plan document. Read it, understand it, and execute on it fairly and consistently. Earlier we mentioned that one of the four fundamentals a fiduciary must follow is abiding by the written document of the plan. While ERISA provides a framework for plans as a whole, your plan document provides the specifics that govern your plan. Understand what the document says as well as any amendments to the document. Remember the Summary Plan Description or brochures regarding the plan are abbreviations of the original document and may gloss over important aspects of your plan. So know the original. After understanding it, your job is to apply it fairly and consistently — this not only protects you but your participants. After all, like the plan it represents, the plan document is written for them.

Footnotes

[1] ERISA Section 3(21)(A)

[2] ERISA Section 3(38)

[3] ERISA Section 405(d)(1)

[4] ERISA Section 403(a)

[5] ERISA Section 404(a)(1)(B)

[6] 29 CFR 2509.94-2

[7] Information that must be provided includes:

(a) An explanation that the plan is intended to be a 404(c) plan.

(b) An explanation that the fiduciaries may be relieved of liability.

(c) For each designated alternative, a general description of the investment objectives and risk and return characteristics, and information regarding the type and diversification of assets in the portfolio of the designated alternative.

(d) The identity of any designated investment manager.

(e) An explanation of the circumstances under which participants may give investment instructions, including limitations on these instructions; restrictions on transfer; limitations on voting rights; and information on penalties or adjustments related to fund transfers.

(f) A description of transaction fees and expenses chargeable against the participant's account.

(g) Information on the identification of the plan fiduciary responsible for giving information on request, and a description of that information.

(h) Information regarding investments in employer securities, including a description of the procedure to provide for confidentiality and the identity of the fiduciary charged with monitoring compliance with the confidentiality requirement.

(i) A copy of the most recent prospectus provided to the plan if the investment is subject to the Securities Act of 1933 (this can be given immediately before or after investment).

(j) After a participant's investment, plan materials related to the exercise of voting, tender, or similar rights after investment transactions. If there are plan provisions regarding the exercise of these rights, participants must receive a description of, or reference to, these provisions. While the plan is not required to pass through such rights, Section 404(c) relief is not available to the extent that plan fiduciaries exercise the rights.

[8] Participants must be provided certain information on request. This material must be based on the latest information available to the plan, including:

(a) A narrative of the annual operating expenses of each designated investment alternative, including investment manager fees, administrative fees, and transaction costs, which reduce the rate of return to the participant. The aggregate amount of these expenses must be expressed as a percentage of average net assets of the designated investment alternative. If the information is already in the prospectus, providing the prospectus should suffice.

(b) Copies of prospectuses, financial statements and reports, and other materials related to the investment alternatives to the extent the information is provided to the plan.

(c) Regarding the designated investment alternatives: (i) a list of assets comprising the portfolio of the alternative that constitutes plan assets and the value of the assets, and (ii) if the asset is a fixed rate investment contract, the name of the issuer of the contract, the term of the contract, and the rate of return on the contract.

(d) The value of shares or units and past and current investment performance of each available alternative, net of expenses.

(e) The value of the shares or units held in a particular participant's account.

Notes

For more information, please contact Wells Fargo at 1-800-690-9721.

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